United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7235

In The

United States Court of Appeals

For The Second Circuit

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P/S

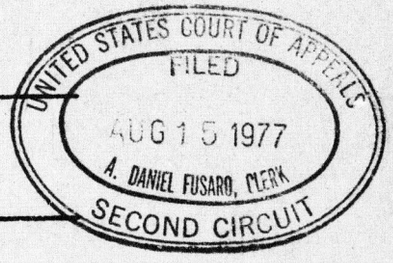
FIMEX CORP.,

Plaintiff-Appellant,

vs.

BARMATIC PRODUCTS CO.,

Defendant-Appellee.



BRIEF FOR DEFENDANT-APPELLEE

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77-7235

In The

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For the Second Circuit

FIMEX CORP.,

Plaintiff-Appellant,

vs.

BARMATIC PRODUCTS CO.,

Defendant-Appellee.

DEFENDANT-APPELLEE'S BRIEF

Statement of The Issues Presented

1. Did the lower court properly conclude that Section 2(a) of the Robinson-Patman Act does not apply to sales of commodities destined for export trade, whether sold in this country or abroad, where none of the commodities were resold within the United States.

2. Did the lower court properly conclude as a matter of law that none of the products sold by defendant to plaintiff were "for use, consumption or resale within the United States" as required by Section 2(a) of the Robinson-Patman Act?

RELEVANT STATUTE

Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a) (1970), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . . (emphasis added).

STATEMENT OF THE FACTS

I. History of Action

On November 4, 1976, appellant, Fimex Corporation (hereinafter referred to as plaintiff or Fimex), filed a complaint alleging that appellee, Barmatic Products Company (hereinafter referred to as defendant or Barmatic), had violated Section 2(a) of the Robinson-Patman Act amendments to the Clayton Antitrust Act, 15 U.S.C. § 13(a) (1970) (Compl. ¶ 13, J. Ap. 4a).[1/] Plaintiff sought treble damages and injunctive relief.

The defendant filed a motion for summary judgment, supported by the affidavit of Allan J. Korecky, President of Barmatic, with attached certificates of export and purchase orders relating to plaintiff's purchases of products from defendant (J. Ap. 13a-18a). Defendant's motion for summary judgment was based on the ground that Section 2(a) of the Robinson-Patman Act did not apply to the sales of products by defendant to plaintiff since they did not involve "commodities . . . sold for use, consumption, or resale within the United States" or any place under its jurisdiction, 15 U.S.C. § 13(a) (1970) (J. Ap. 11a-30a). Plaintiff amended its Complaint and filed an opposition to defendant's motion with supporting affidavit of Isaac L. Cohen, Vice President of Fimex, and attached exhibits (J. Ap. 39a-55a).

1/ Citations to the record reproduced as part of the Joint Appendix are prefixed by "J. Ap."

On February 2, 1977, the deposition of Isaac L. Cohen was taken to fully develop the factual record (J. Ap. 66a-139a). Although plaintiff was granted permission to take the deposition of Allan J. Korecky, plaintiff requested and was provided with an affidavit in lieu of deposition (Docket Entry 15, J. Ap. 1a). On February 25, 1977, the date of the argument on the motion, plaintiff submitted an affidavit of counsel with attached exhibits and a second affidavit of Isaac L. Cohen (J. Ap. 59a-65a; 56a-58a).

Based on the affidavits and supporting exhibits, the deposition of Isaac Cohen and exhibits and the memoranda of the parties, on April 14, 1977, the Honorable Thomas C. Platt, United States District Court Judge for the Eastern District of New York, issued a memorandum and order granting the defendant's motion for summary judgment (429 F. Supp. 978, J. Ap. 140a-143a). Judge Platt held that Section 2(a) of the Robinson-Patman Act did not apply to export sales and it made no difference that the purchaser was located within the United States if the products sold were not for use, consumption or resale within the United States (429 F. Supp. at 980, J. Ap. 142a). Judge Platt also held that all of the sales of products by Barmatic to Fimex were not "for use, consumption or resale

within the United States" and considered three alternative tests in construing this language: (1) the seller's intent based on where the buyer customarily resells the products; (2) the buyer's intent; and (3) where the goods were, in fact, resold. Applying the first and third tests, the court relied on the following facts in concluding that Section 2(a) did not apply: (1) none of the products were actually resold within the United States; (2) Fimex was primarily engaged in export trade and customarily resold products to foreign destinations; (3) Fimex consistently advised Barmatic that it was exporting the products purchased; and (4) Fimex never notified Barmatic that it intended to resell any products in the United States. Although the court rejected the second test (buyer intent), it concluded that even if that test were applicable, plaintiff did not submit any specific facts to create a genuine issue of material fact (249 F. Supp. at 980-981, J. Ap. 142a-143a).

II. The Parties

Defendant, Barmatic Products Company, is an Ohio corporation with its principal and only place of business in Cleveland, Ohio. Barmatic is engaged in the manufacture and distribution of truck and automobile steering parts (Affidavit of A. J. Korecky at ¶ 2, J. Ap. 13a).

Plaintiff, Fimex Corporation, is a New York corporation with its principal place of business in Syosset, New York. From its inception, Fimex has been engaged almost exclusively in the export distribution of automotive products to customers located in foreign countries (Cohen Dep. at pp. 10-11, 19-20, J. Ap. 69a-70a, 75a-76a). In 1972, when the applicable Federal Tax Laws first permitted, Fimex requested and obtained status as a Domestic International Sales Corporation, which meant that, at least, 95 per cent of its gross receipts were attributable to the sale of export property -- property held for sale outside the United States (Cohen Dep. at pp. 33-35, 41-42, J. Ap. 87a-89a, 93a-94a; Cohen Dep. Ex. 1, J. Ap. 138a) (See 26 U.S.C. §§ 991, 992(a), 993(c) (Supp. V, 1975)). Since that time to the present, Fimex has been a Domestic International Sales Corporation (Cohen Dep. at pp. 41-42, J. Ap. 93a-94a). When asked to provide what percentage of the remaining 5 per cent of Fimex's sales were in the United States, Mr. Cohen responded: "It is of no real concern to me." (Cohen Dep. at p. 71, J. Ap. 110a).[2/]

2/ It should also be pointed out that Fimex has no sales representatives in the United States, conducts no advertising in domestic trade magazines and has no product catalog of its own (Cohen Dep. at pp. 26-27, 36-37, 42-43, J. Ap. 81a-82a, 90a-91a, 94a-95a). Fimex only advertised in an international trade magazine geared to international business (Cohen Dep. at pp. 36-37, J. Ap. 90a-91a).

III. The Transactions Involved

During the period 1960 to and including 1976, Barmatic sold truck and automobile steering parts to Fimex. During the period 1968 to and including 1976, the period for which defendant had records, Barmatic's sales of products to Fimex averaged approximately $14,500 per year in dollar volume (Affidavit of J. A. Korecky at ¶ 4, J. Ap. 14a).

During his deposition, Mr. Cohen clearly admitted that none of the products sold to Fimex by Barmatic were resold in the United States or any place under its jurisdiction (Cohen Dep. at pp. 43-44, 52, J. Ap. 95a-96a, 99a). At the conclusion of the deposition, counsel for Fimex stipulated that this was the case (Cohen Dep. at pp. 81-86, J. Ap. 120a-125a).

Fimex's consistent pattern of doing business was to first obtain a purchase order from a customer and then go out and seek a supplier to fill that customer's order (Cohen Dep. at pp. 9-10, 18-19, 21-22, 25-26, 39, J. Ap. 68a-69a, 74a-75a, 77a-78a, 80a-81a, 92a). Fimex consistently followed this pattern in its sales of Barmatic products. During his deposition, Mr. Cohen produced 26 folders which contained invoices and bills of lading which reflected Fimex's sales of products purchased from Barmatic during the period 1969 to and including

1976 (Cohen Dep. at pp. 30-33, J. Ap. 84a-87a). These folders were the only documents that Mr. Cohen could find which reflected Fimex's sales of products purchased from Barmatic (Cohen Dep. at pp. 30-33, J. Ap. 84a-87a). Mr. Cohen admitted that, in most instances in which he purchased products from Barmatic, he had received an order from a customer first and then sought a supplier to fill that order (Cohen Dep. at pp. 44-45, J. Ap. 96a-97a). When asked whether he could identify those instances where Fimex did not follow this pattern, he indicated that he would supply this information (Cohen Dep. at p. 45, J. Ap. 97a). No such information was ever provided.

Pursuant to its established pattern of doing business, Fimex submitted purchase orders to Barmatic which consistently advised Barmatic that the products it was purchasing were being resold in export trade to foreign destinations, principally to the country of Turkey. Exhibits 1 and 2, attached to Mr. Korecky's Affidavit in support of Defendant's Motion, reflected all certificates of export and purchase orders submitted by Fimex to Barmatic relating to the actual sales of products by Barmatic to Fimex during the period 1968 to and including 1976 (Samples of Exhibits 1 and 2 appear at J. Ap. 17a-18a).

Exhibit 1 contained all copies of the certificates of export and the purchase orders that related to truck steering parts, which ordinarily are subject to Federal Excise Tax (26 U.S.C. § 4061(b)(1) (1970). The certificates of export were required under Federal Excise Tax Regulations in order to trigger the exemption of these products from excise tax when destined for export trade. The certificates of export were submitted by Fimex to Barmatic to comply with Section 316.25 of Federal Excise Tax Regulation 46, which required the following documentation:

> . . . (2) where delivery by the manufacturer is to be made within the United States, a statement from the purchaser showing (i) that the article is purchased to fill an existing or future order for delivery to a foreign destination; . . . and (ii) that such article will be transported to its foreign destination in due course prior to use or further manufacture and prior to any resale except for export. (CCH Federal Excise Tax Reporter ¶ 1869A at p. 1328)

The certificates of export include a certification by Fimex: "That all articles and merchandise on this order are for export in due course, prior to use, resale or further manufacture." (Exhibit 1 to Korecky Affidavit, J. Ap. 17a). Thus, by submitting the certificates of export to Barmatic, Fimex certified that the products covered by the subject purchase orders were for export in due course.

Exhibit 2 included all copies of the purchase orders submitted by Fimex to Barmatic that covered the sale of automobile steering parts, which were not subject to the Federal Excise Tax (26 U.S.C. § 4061(b)(2) (Supp. V, 1975)). All but four of these purchase orders indicate that the products being ordered were for export, primarily to the country of Turkey (Korecky Affidavit ¶ 5, J. Ap. 14a-15a; Exhibit 2 to Korecky Affidavit, J. Ap. 18a).

Exhibits 1 and 2 reflect a consistent pattern of Fimex advising Barmatic that the products being purchased were destined for Turkey or were purchased for export and not subject to excise tax. Indeed, all the Barmatic products resold by Fimex were exported to the country of Turkey (Cohen Dep. at pp. 43-44, J. Ap. 95a-96a; Cohen Dep. Ex. 3). Significantly, Mr. Cohen, who submitted two affidavits (J. Ap. 39a-41a, 56a-57a), did not even suggest that he had ever manifested to Barmatic an intent to resell any of its products to customers within the United States. Moreover, defendant's Local Rule 9(g) Statement with respect to this fact was not denied by plaintiff's Local Rule 9(g) Statement and thus, plaintiff admitted that "During the period 1960 to and including 1976, Fimex Corporation consistently advised Barmatic that

the products it was purchasing were being resold in export trade to foreign destinations, primarily to the country of Turkey." (Defendant's Local Rule 9(g) Statement at ¶ 3, J. Ap. 34a-35a; Plaintiff's Local Rule 9(g) Statement, J. Ap. 36a-37a). Indeed, plaintiff's initial Memorandum in Opposition admitted that "defendant was . . . made aware that the plaintiff was exporting its goods . . . because the plaintiff, in compliance with the law, obtained certain export certificates" (Plaintiff's Memorandum in Opposition at p. 8). In short, the evidence overwhelmingly established that Fimex consistently advised Barmatic that it was purchasing its products for export and that, in fact, such products were being exported to foreign destinations.

ARGUMENT

I

SECTION 2(a) OF THE ROBINSON-PATMAN ACT DOES NOT APPLY TO SALES OF COMMODITIES DESTINED FOR EXPORT TRADE IRRESPECTIVE OF WHETHER THE BUYER IS LOCATED IN THE UNITED STATES OR ABROAD

Plaintiff contends, as it did below, that its location in the United States triggers application of Section 2(a) of

the Robinson-Patman Act amendments,[3/] despite the fact that it was engaged in exporting the products it purchased to customers located in foreign countries (A. Br. 7-8, 10). Indeed, the crux of the plaintiff's position is: "All that is required is that the initial purchaser be in the United States and purchase the goods for use, consumption or resale anywhere in the world" (A. Br. 12). The lower court rejected plaintiff's contention and its decision is supported by: (1) the clear and unambiguous language of the statute, (2) the legislative history of the statute, and (3) the precedents and authorities construing the statute.

Section 2(a) of the Robinson-Patman Act, by its terms, applies only to commodities "sold for use, consumption or resale within the United States or any Territory thereof, or the District of Columbia or any insular possession or other place under the jurisdiction of the United States. . . ." (15 U.S.C. § 13(a) (1970)). This clear and unambiguous jurisdictional

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3/ The elements of a Section 2(a) violation are (1) a discrimination in price; (2) in contemporaneous sales to two competing purchasers; (3) of commodities that are of like grade and quality; (4) for use, consumption or resale within the United States; (5) in interstate commerce; and (6) where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with the person who grants or knowingly receives the benefit of such discrimination or customers of either of them. Ingram v. Phillips Petroleum Co., 259 F. Supp. 176, 180 (D.N.M. 1966); Castlegate, Inc. v. National Tea Co., 34 F.R.D. 221, 229 (D. Colo. 1963). None of the assertions made in the affidavits of the parties, the documentary materials or the deposition of Mr. Cohen reflect a violation of Section 2(a) of the Robinson-Patman Act.

element of Section 2(a) was part of the original Section 2 of the Clayton Act, passed in 1914, and was retained in Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, enacted in 1936.

The legislative history of original Section 2 of the 1914 Clayton Act and that of Section 2(a) of the 1936 Robinson-Patman Act amendments clearly reflect the intent of Congress that the original Section 2 and the Section 2(a) amendment were limited to domestic commerce. Indeed, in explaining this language, both the House and Senate Reports relating to original Section 2 noted:

> This section expressly forbids discrimination in price between different dealers of commodities that are sold for use, consumption, or resale within the United States or any place within its jurisdiction. . . . It will be observed that the language used makes this section applicable only to domestic commerce, or, in other words, <u>its application is restricted to commerce carried on in the United States, or in places under the jurisdiction thereof, and has no reference to commodities sold either in this country or abroad which are intended solely for our export trade</u>. H.R. Rep. No. 627, 63d Cong. 2d Sess. 8 (1914); S. Rep. No. 698, 63d Cong., 2d Sess. 3 (1914)(emphasis added).

The specific limiting language of original Section 2 was contained in Section 2(a), which amended that provision. S. Rep. No. 1502, 74th Cong., 2d Sess. 5 (1936). Indeed, the 1936 Congressional debates reflect the understanding of Senator Logan that ". . . the provisions of the bill are confined specifically to the United States and possessions of the United States." 80 Cong. Rec. 6333 (1936). Contrary to plaintiff's contention (A. Br. 16-17), this statement in no way supports the conclusion that Congress intended to make a distinction relating to sales destined for export trade, depending on whether the buyer is an exporter located here or an importer located in a foreign country. Such a construction would render meaningless the clear limiting language of "use, consumption or resale within the United States." The statutory language means exactly what it states and if commodities are sold for export trade they are not for use, consumption or resale within the United States irrespective of where the buyer is located. In short, Section 2(a)'s application turns on whether the commodities are destined for use, consumption or resale within the United States or any place under its jurisdiction and not on whether the buyer is located in this country or abroad.

In Zenith Radio Corp. v. Matsushita Elect. Indust. Co., 402 F. Supp. 244 (E.D. Pa.), pet. denied, 521 F.2d 1399 (3d Cir. 1975), the court dismissed a Section 2(a) claim because the commodities involved in the alleged discrimination were not in domestic commerce. The complaint in that case alleged price discrimination in sales by the defendants, Japanese manufacturers, between their Japanese customers and American customers. The court held that both "legs" of the alleged discrimination must involve commodities that are sold for use, consumption or resale within the United States. Id. at 248. After an extensive analysis of the legislative history of Section 2(a) of the Act and original Section 2 of the Clayton Act, the court concluded that Section 2(a) did not apply unless the commodities which were the subject of the alleged discrimination were destined for commerce within the United States. Id. at 248-50. Plaintiff's attempt to distinguish the instant case from Zenith Radio Corp., supra, is misplaced. Although the facts are obviously different, the court's analysis in Zenith clearly applies to the instant situation. As the court pointed out, Congress intended that Section 2(a) apply only where both "legs" of the alleged discrimination involve commodities used, consumed or resold within the United States

or any place under its jurisdiction. The Zenith analysis applies with a fortiori effect where, as here, both "legs" of the alleged discrimination involve commodities resold in foreign trade.[4/]

Numerous commentators agree that Section 2(a) does not apply to sales destined for export trade and it makes no difference whether the buyer is located in the United States or abroad. See, e.g., A. Stickells, Federal Control of Business-Antitrust Laws § 130, at p. 455 (1972); C. Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 15 at note 21 (1959); F. Rowe, Price Discrimination Under the Robinson-Patman Act 82 (1962). The late Congressman Wright Patman, co-sponsor of the Robinson-Patman Act, in his treatise, notes with respect to the coverage of Section 2(a):

> The italics above distinctly delimit the application of the price-discrimination provisions of the Act to sales for use, consumption, or resale within the confines of any place under the jurisdiction of the United States. If that were not the intent, then the inclusion of this clause in the Act represents just a waste of good words. . . .

4/ Recently, within the context of Section 2(a)'s interstate commerce requirements, the United States Supreme Court recognized the limited application of Section 2(a)'s reach. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974).

> Therefore, in applying the Act to export sales, it is evident that no limit or regulation of price discrimination in such sales is intended, unless goods involved in such transactions are resold for use, consumption, or resale in any place under the jurisdiction of the United States. It is likewise apparent that the parties to any sales transaction, regardless of where the parties are located, are not subject to the price discrimination provisions of the Act, unless such goods are sold for resale in, or are to be used or consumed in, any place under the jurisdiction of the United States (W. Patman, The Robinson-Patman Act 208 (1938) (emphasis added)).

Several courts have adopted Congressman Patman's interpretation of Section 2(a)'s coverage. Baysoy v. Jessop Steel Co., 90 F. Supp. 303, 305 (W.D. Pa. 1950); Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc., 227 F. Supp. 829, 833 (N.D. Ohio 1964). Both Baysoy and Canadian Ingersoll-Rand Co., supra, refused to apply Section 2(a)'s limitation relating to export sales to Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c) (1970), which deals with unlawful brokerage payments. Both cases, relying on Congressman Patman's distinction between Section 2(a) and 2(c), held that Section 2(c) of the Act applied to the payment of unlawful brokerage in

foreign commerce because that section did not contain the limiting language: "use, consumption or resale within the United States." Both courts applied the general definition of "commerce" contained in Section 1 of the Clayton Act, 15 U.S.C. § 12 (1970), which includes foreign commerce, to Section 2(c). However, that general definition does not apply where Congress used specific language to delimit the application of Section 2(a). Otherwise, the delimiting language of Section 2(a) would be rendered meaningless and contrary to the clear intent of Congress. Zenith Radio Corp. v. Matsushita Elect. Indust. Co., 402 F. Supp. at 248. In any event, both decisions implicitly support the conclusion that Section 2(a) does not apply to sales for export trade, and this Court need not reach the question of Section 2(c)'s foreign commerce application. 5/

In short, the language of Section 2(a), its legislative history, and the precedents and authorities construing the statute overwhelmingly support the conclusion that Section 2(a) of the Robinson-Patman Act does not apply to export sales whether made to a buyer in this country or abroad.

5/ The analysis in Baysoy, and adopted in Canadian Ingersoll-Rand Co., supra, has been criticized to the extent it recognized that Section 2(c) does apply to foreign commerce. F. Rowe, Price Discrimination Under the Robinson-Patman Act 82 (1962). Sections 2(c), (d) and (e) of the Act were designed by Congress to plug the loopholes of indirect price discriminations through disguised price concessions in the form of "dummy" brokerage payments or pseudo-advertising payments and allowances. H. R. Rep. No. 2287, 74th Cong., 2d Sess. 14-16 (1936); B. Zorn & G. Feldman, Business Under the New Price Laws 84 (1937).

II

SINCE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT THE PRODUCTS WERE NOT SOLD FOR USE, CONSUMPTION OR RESALE WITHIN THE UNITED STATES, SUMMARY JUDGMENT WAS PROPER

Plaintiff contends that summary judgment was inappropriate and argues that there are genuine issues of material fact as to whether plaintiff's purchases of products from Barmatic were for resale in export trade (A. Br. 18-19).[6/] The lower court properly disposed of this contention by carefully analyzing the language of Section 2(a) within the context of three alternative tests: (1) the seller's intent based on where the buyer customarily resells his products; (2) the buyer's intent; or (3) where the products were, in fact, resold (429 F. Supp. 980-81, J. Ap. 142a-143a).

We submit that either the intent of the seller or where the goods are, in fact, resold is controlling in applying Section 2(a) of the Act. Section 2(a) of the Robinson-Patman Act only applies to actual, consummated sale and resale transactions. As noted by Professor Stickells:

6/ The mere assertion of an alleged violation of Section 2(a) does not establish a violation and is immaterial to a resolution of this appeal where the sole threshold issue is whether Section 2(a) of the Act even applies to the subject transactions.

> That such 'use, consumption, or resale' must be consummated within the territorial jurisdiction of the United States and its territories and possessions simply delimits the scope of jurisdictional coverage. Thus while foreign exporters selling within these territorial areas are necessarily subject to the Act, domestic exporters are not, at least to the extent that their sales or resales are outside such areas. (A. Stickells, Federal Control of Business-Antitrust Laws § 130, at p. 455 (1972)) (emphasis added).

The entire scheme of Section 2(a) makes it clear that it is concerned only with actual, consummated sale and resale transactions. Report on Price Discrimination in Non-Sale and Non-Commodity Transactions at p. 5 (A.B.A. Section of Antitrust Law (1973)). The touchstone of the Act's application is the actual use, consumption or resale of the products within the United States: the commodities involved must end up in the United States. Zenith Radio Corp. v. Matsushita Elect. Indust. Co., 402 F. Supp. at 248.

Applying either the first or third test there is no question that the overwhelming record evidence established that: (1) none of the products were resold in the United States; (2) Fimex is almost exclusively engaged in export trade; (3) Fimex consistently advised Barmatic that it was exporting the products it was purchasing; and (4) Fimex never notified Barmatic that it intended to resell any product

in the United States. (See detailed analysis of facts, supra at pp. 6-11). During his deposition, Mr. Cohen produced 26 folders which contained invoices and bills of lading which reflected Fimex's sales of products purchased from Barmatic during the period 1969 to and including 1976 (Cohen Dep. at 30-33, J. Ap. 84a-87a). These were the only documents which Mr. Cohen could find which reflected Fimex's sales of products purchased from Barmatic. None of the products purchased by Fimex from Barmatic were resold in the United States. Indeed, in every instance, the invoices reflect the fact that the products were resold to customers in the country of Turkey (Cohen Dep. at 43-44, J. Ap. 95a-96a; Cohen Dep. Ex. 3). The following admission by Mr. Cohen unequivocally established that none of the products sold to Fimex by Barmatic were resold in the United States:

> Q Getting back to those 26 folders, were you able to find any evidence in your records of a sale by Fimex of products purchased from Barmatic to a customer in the United States?
> A No, Sir.
> Q Did you look hard for it?
> A Yes, Sir.
> Q You spent a great deal of time trying to find one?
> A I spent days.
> Q You couldn't find one?
> A No, Sir.

Q So as best you can determine, based on your search, none of the products that you purchased from Barmatic was sold to customers in the United States; is that correct?

A No, Sir.

Q No, Sir, what?

A No, none of the products were sold in the United States. (Cohen Dep. at 52, J. Ap. 99a).

In short, none of the products which Fimex purchased from Barmatic were resold in the United States.

There is only one instance in Mr. Cohen's two affidavits (J. Ap. 39a-41a, 56a-57a) where he asserts that he purchased products from Barmatic for resale in the United States. This involved approximately 500 ES140Ls (tie rods), which were in Fimex's warehouse as of December 31, 1976. He identified those ES140Ls as having been ordered by Fimex on February 21, 1975 (Cohen Dep. at 53-55, J. Ap. 100a-102a; Cohen Dep. Ex. 2, J. Ap. 139a). The purchase order identified by Mr. Cohen indicates that the products being purchased were marked: Fimex OTO, Istanbul (Cohen Dep. Ex. 4, J. Ap. 127a). Thus, the purchase order submitted by Fimex to Barmatic, which covers the approximately 500 ES140Ls in Fimex's warehouse, manifests that Fimex advised Barmatic that these products were destined for Istanbul, Turkey.

Therefore, whether viewed within the context of the first or third test, the overwhelming facts establish the absence of any genuine issue of material fact and the appropriateness of the grant of summary judgment.

The lower court rejected applicability of the second test (buyer intent):

> If a buyer's intent test, particularly an undisclosed one, were to be read into the Act, it would be an easy matter for every buyer which (as has been the case with the plaintiff) traditionally purchased for export to place a seller in jeopardy of a suit such as this by submitting on occasion orders to a seller for items which the buyer subsequently claims were for the domestic market. In short, this would make the Act a real trap for the unwary and subject sellers to liability which might only be said to be clearly undeserved. In simple fairness this Court does not feel that any such inequitable result was ever intended and hence concludes that no such test is applicable. (249 F. Supp. at 981, J. Ap. 143a).

However, although the lower court rejected the buyer-intent test, it went on to conclude that even under this test the plaintiff had failed to establish any specific facts to create a genuine issue of material fact on this point (249 F. Supp. at 981, J. Ap. 143a).

Although we agree with the lower court that the second test -- a buyer intent test -- is not applicable to Section 2(a), plaintiff contends that it did raise a genuine issue of fact. Contrary to plaintiff's contention, the lower court did not ignore either of the two affidavits submitted by Mr. Cohen. The second affidavit of Mr. Cohen alluded to the fact that he had submitted one purchase order to Barmatic which made no reference to whether the goods were for export or domestic sale (J. Ap. 56a-57a). This second affidavit of Mr. Cohen was attached to an affidavit of counsel for plaintiff (J. Ap. 59a-63a; see original affidavit which is part of the record on appeal). Counsel's affidavit alluded to 28 purchase orders which did not indicate whether the purchases were for export or domestic sale (J. Ap. 60a). However, all but four of the purchase orders alluded to by counsel for plaintiff were purchase orders which were the subject of certificates of export submitted by Fimex to Barmatic certifying that the products were, in fact, for export. (See sample Exhibit 1 to Korecky Affidavit, J. Ap. 17a, and the entire exhibit which contains all the certificates of export and related purchase orders and which is part of the record on appeal). Thus, the very purchase orders relied on by plaintiff supported defendant's position that there was no genuine issue of material fact that Fimex consistently

advised Barmatic that it was exporting the products it was purchasing. Indeed, plaintiff conceded this point in its initial memorandum in opposition to the motion for summary judgment (Plaintiff's Memorandum in Opposition at p. 8).

In the face of the overwhelming record evidence, plaintiff contends that it raised a genuine issue of fact on the question that Fimex intended or attempted to resell the products in the United States. The mere assertion of an uncommunicated intent or attempt to resell in the United States without any support is totally insufficient to raise a genuine issue of material fact. Not only is Mr. Cohen's uncommunicated intent or attempt irrelevant to the application of Section 2(a) of the Robinson-Patman Act, it highlights the inadequacy of Mr. Cohen's affidavits under Rule 56(e) of the Federal Rules of Civil Procedure, even if we assume, arguendo, that a buyer intent test applies. Rule 56(e) requires an affidavit in opposition to a motion for summary judgment to set forth specific facts showing that there is a genuine issue for trial. Coniglio v. Highwood Services, Inc., 495 F.2d 1286, 1292 (2d Cir.), cert. denied, 419 U.S. 1022 (1974).[7/] This is particularly true, where, as here, the alleged proof to show the claimed fact is within plaintiff's knowledge

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7/ Contrary to plaintiff's contention (A. Br. 22), the present case does not involve complex antitrust claims of wide-ranging conspiracy to restrain trade and to monopolize under the Sherman Act, requiring proof of specific intent, which are inappropriate for summary procedures. Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658, 667 (2d Cir. 1974).

or control. 6 Moore's Federal Practice (Part 2) § 56.15[5] at pp. 56-558-559 (1976). As pointed out by this Court in a closely analogous situation in Donnelly v. Guion, 467 F.2d 290, 293 (2d Cir. 1972):

> If this case had proceeded to trial and nothing remained in the case but Mrs. Donnelly's vague and conclusory allegations, unsupported by evidence, it is clear that a directed verdict would have been appropriate. If, indeed, evidence was available to underpin her conclusory statement, Rule 56 required her to come forward with it. A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. A summary judgment motion is intended to "smoke out" the facts so that the judge can decide if anything remains to be tried.

Plaintiff has pointed to no specific facts to support the conclusory assertion of an uncommunicated intent or attempt to resell Barmatic products in the United States even under the buyer intent test.

There is no question but that the plaintiff in this case was given every opportunity to present specific facts to raise a genuine issue of fact: (1) the two affidavits of Mr. Cohen, (2) the affidavit of counsel for plaintiff; (3) Mr. Cohen's deposition; and (4) the lower court granted plaintiff an additional opportunity to depose Mr. Cohen. Moreover, plaintiff was provided with the opportunity to take Mr.

Korecky's deposition and it refused and accepted an affidavit instead. Despite these opportunities, no specific facts were developed by plaintiff. In the face of the overwhelming evidence developed by defendant and the absence of any specific facts developed by plaintiff, there were no inferences to be drawn to create a genuine issue of material fact. See Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 109-110 (2d Cir. 1975); Perma Research & Development Co. v. Singer Co., 410 F.2d 572, 576-578 (2d Cir. 1969). Thus, there is no genuine issue of fact under any of the three tests considered by the court below in construing Section 2(a).

Conclusion

For the reasons stated above, the lower court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATION

The undersigned, hereby certifies that 3 copies of the foregoing Brief for Defendant - Appellee were personally served on JULIEN & SCHLESINGER, P.C., Attorneys for the Plaintiff - Appellant, 2 Lafayette Street, New York, New York 10007 on August 15, 1977.

Dated: August 15, 1977

Salvatore A. Romano

Salvatore A. Romano